Tang & Sim (1983) Co & Anor v PPES Resorts Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 4 OF 1991
HAIDAR J
31 DECEMBER 1991

Civil Procedure *— Counterclaim — Against additional parties — Rules of court governing the application — Amendment of pleadings consequent to adding new parties to counterclaim — Subordinate Courts Rules 1980 O 8 r 3 & O 15 r 3*

The defendant had applied to add Tang Shipping Sdn Bhd as a defendant to its counterclaim, and for its defence and counterclaim to be amended, and for costs of the application to be costs in the cause. The sessions court judge had allowed the application, being of the opinion that it should be under O 8 r 4 and O 15 r 1(3) of the Subordinate Courts Rules 1980 ('the SCR'). The plaintiffs appealed.

Held, dismissing the appeal in part:

(1) The application should be under O 8 r 3 and O 15 r 3 of the SCR, and not under O 8 r 4 and O 15 r 1(3). Order 8 r 4 relates to joinder of parties, and in this case as per the application, the proper rule is r 3 as it relates to counterclaim against additional parties. Order 8 r 3(1) allows the respondent to apply to make the proposed defendant as a defendant to the counterclaim. The respondent has complied with O 8 rr 3(2) and 3(3), and in the event an order is thereby granted, the requirements of O 8 r 3(4) would follow.

(2) Order 8 r 3 of the SCR should be read with O 15 r 3, which is of general application and gives the court general power to grant leave for amendment of any document except a judgment or order. If leave is granted under O 8 r 3 for the proposed defendant to be added as an additional party in the counterclaim, it must necessarily follow that leave should similarly be granted for the consequential amendment under O 15 r 3(1).

(3) The order of the sessions court judge that costs be in the cause was set aside. The costs of the application should properly be the appellants' by virtue of O 15 r 3(1) of the SCR.

[Bahasa Malaysia summary

Defendan telah memohon untuk menambah Tang Shipping Sdn Bhd sebagai satu defendan kepada tuntutan balasnya, dan untuk pembelaan serta tuntutan balasnya dipinda, dan untuk kos permohonan itu menjadi kos dalam kausa. Hakim mahkamah sesyen telah membenarkan permohonan itu; beliau berpendapat yang ia patut dibawa mengikut A 8 k 4 dan A 15 k 1(3) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Plaintif telah merayu.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Permohonan itu sepatutnya dibawa mengikut A 8 k 3 dan A 15 k 3 KMR, dan bukan mengikut A 8 k 4 dan A 15 k 1(3). Aturan 8 k 4 berhubung dengan percantuman pihak-pihak, dan di dalam kes ini menurut permohonan itu, kaedah yang berpatutan ialah k 3 kerana ia berhubung dengan tuntutan balas terhadap pihak-pihak tambahan. Aturan 8 k 3(1) membenarkan responden memohon untuk menjadikan defendan yang dicadangkan itu sebagai defendan kepada tuntutan balas. Responden telah mematuhi A 8 kk 3(2) dan 3(3), dan jika satu perintah lantaran itu dibenarkan, kehendak A 8 k 3(4) akan turut dipatuhi.

(2) Aturan 8 k 3 KMR harus dibaca bersama dengan A 15 k 3, yang terpakai secara am dan memberi mahkamah kuasa am untuk membenarkan pindaan sebarang dokumen kecuali satu penghakiman atau perintah. Jika kebenaran diberikan di bawah A 8 k 3 untuk defendan yang dicadangkan itu ditambah sebagai satu pihak tambahan dalam tuntutan balas itu, sememangnya kebenaran harus secara sama diberikan untuk pindaan terbitan di bawah A 15 k 3(1).

(3) Perintah hakim mahkamah sesyen bahawa kos adalah dalam kausa diketepikan. Kos permohonan sepatutnya kepunyaan perayu memandangkan A 15 k 3(1) KMR.]

Case referred to

1 *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 (distd)

Legislation referred to

Subordinate Courts Rules 1980 O 8 rr 3, 4, O 15 rr 1, 3

Stanley Eddy (*Battenberg & Talma*) for the appellants.
Alvin Chong (*Goh & Partners*) for the respondent.

Cur Adv Vult

Haidar J: This is a civil appeal against the order of the learned sessions court judge allowing the application of the respondent/defendant under O 8 r 3 and O 15 r 1(1) of the Subordinate Courts Rules 1980 ('the SCR').

In the notice of application (p 3 of the amended appeal record) the respondent/defendant seeks for an order:

(1) that Tang Shipping Sdn Bhd (formerly known as Tang & Sim Shipping (1983) Sdn Bhd) be added as and shall become a defendant to the defendant's counterclaim;
(2) that the defendant's defence and counterclaim dated 23 August 1988 be amended as set forth in red ink in the pleadings attached;
(3) costs of the application be costs in the cause.

The grounds of the application are: A

(1) it is necessary for the said Tang Shipping Sdn Bhd (formerly known as Tang & Sim Shipping (1983) Sdn Bhd) be added as a defendant to the plaintiff's (defendant's ?) counterclaim on the ground that the said Tang Shipping Sdn Bhd is liable along with the plaintiff in respect of the subject matter of the counterclaim the relief connected with the B original subject matter of the action;
(2) that the amendments are necessary for the purpose of determining the real questions in controversy between the parties by this honourable court; and
(3) that the parties are not prejudiced by the addition of the said Tang C Shipping Sdn Bhd and by the proposed amendments.

The application is supported by the affidavit of Alvin Chong, counsel for the respondent/defendant. Tang & Sim (1983) Co, the plaintiff and Tang Shipping Sdn Bhd (formerly known as Tang & Sim Shipping (1983) Sdn Bhd) ('the proposed defendant'), appellants in this appeal, opposed the D application and two affidavits were filed by Johnny Tang and Tang Sui Chung.

The learned sessions court judge in his ruling was of the opinion that the application should be under O 8 r 4 of the SCR as it is for an addition of a party to the action and under O 15 r 1(3) as it concerns amendment. With respect, I think the learned sessions court judge addressed his mind wrongly E on the requisite rules. For the reasons to be set out by me hereunder, the relevant rules should be r 3 of O 8 and r 3 of O 15 of the SCR. In my view O 8 r 4 relates to joinder of parties and in this case, as per the application, the proper rule is r 3 as it *relates to counterclaim against additional parties*. Order 8 r 3 reads:

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(1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject-matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject-matter of the action, then, subject to rule 5(2), he may, with the leave of the Court, join that other person as a G party against whom the counterclaim is made.
(2) An application for an order under paragraph (1) must be made by notice stating the grounds of the application and the name, address and occupation of that person, and supported by affidavit (if any).
(3) Notice of the application must be served on the plaintiff and every other defendant (if any). H
(4) Where an order is made for the defendant to join that other person as a party —

(a) the order must be in Form 14;
(b) the other person must be added as and shall become a defendant to the counterclaim;
(c) a memorandum of the order must be entered on the summons and in I the Cause Book; and
(d) the Court must fix a return day for the further hearing of the summons and may give such directions and make such orders for the further conduct of the proceedings.

It would appear, in my view, that O 8 r 3(1) allows the respondent to apply to make the proposed defendant as a defendant to the counterclaim. It would appear also that the respondent has complied with O 8 rr 3(2) and 3(3) of the SCR, and in the event an order is thereby granted, the requirements of O 8 r 3(4) would follow. Order 8 r 3(1) is in pari materia with O 15 r 3(1) of our Rules of the High Court 1980 (same as O 15 r 3(1) of the English Rules of the Supreme Court 1965). Volume 1 *The Supreme Court Practice* (1991) at p 179 stated the application of this rule as follows:

> It is a further application of the principle contained in SCA 1981, s 49(2) (formerly s 43 of JA 1925) 'that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided'. *The procedure under this rule is alternative and additional to third party procedure under O 16 and arises when the defendant makes a counterclaim against the plaintiff and an additional party* or a co-defendant.
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> Paragraph 1 of this rule is wider in scope than the former O 21 r 11, since it allows the joinder of a person to the counterclaim made against the plaintiff, not only where that person is liable 'along with' the plaintiff, but also where the relief claimed against that person relates to or is connected with the original subject matter of the action. The second-limb of para (1) allows the defendant to make a claim against the added party which is alternative only to his claim against the plaintiff thus negativing *Times Cold Storage Co v Lowther* [1911] 2 KB 100, but this is subject to the powers of the court under r 5(2). (Emphasis added.)

It is further stated that this rule, however, only applied subject to the conditions and circumstances enumerated thereunder. Looking at the proposed defence and counterclaim I am of the opinion that the respondent has satisfied r 3(1).

The marginal note in O 8 r 3 of the SCR makes a cross-reference to O 15 r 3. To my mind, it is intended to be read with O 15 r 3. Order 15 r 3 of the SCR reads:

> (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings, either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
> (2) This rule shall not have effect in relation to a judgment or order.

Order 15 r 3 is in pari materia with O 20 r 8 of our Rules of the High Court 1980 (same as O 20 r 8 of the English Supreme Court Rules 1965). Volume 1 *The Supreme Court Practice* (1991) at p 363 in respect of the application of r 8 stated:

> The generality of r 8 applies as well to writs and pleadings as to other documents. There is no difference in substance between the court giving leave to amend under rr 5 and 7, and the court making an order that an amendment be made under r 8.

However, this rule shall have no effect in relation to a judgment or order (see para (2)).

I agree that the learned sessions court judge for the reasons stated by him, was right in disagreeing with the contention of Mr Stanley Eddy, counsel for the appellants, that the amendment, if allowed, would deprive the proposed defendant of his defence of limitation as it appears that such defence cannot be available to him. In any event, O 15 r 3(1) of the SCR is of general application and gives the court general power to grant leave for amendment of any document except a judgment or order. In my opinion, if leave is granted under O 8 r 3 for the proposed defendant to be added as an additional party in the counterclaim, it must necessarily follow that leave should similarly be granted for the consequential amendment under O 15 r 3(1) of the SCR. The case of *Government of Malaysia v Mohamed Amin bin Hassan*[1] relied on by the appellants is of no assistance as it did not consider specifically O 8 r 3 and O 15 r 3(1) of the SCR.

I am of the view that the relief claimed against the proposed defendant relates to or is connected with the original subject matter of the action and all matters of controversy between the parties ought to be determined by the court at the trial of the action. Consequently I agree that the amendments would not prejudice the appellants in a way which cannot be compensated for by costs.

In the circumstances the appeal is dismissed but the order of the learned sessions court judge that costs be in the cause as per the application be set aside. The costs of the application should properly be the appellants' by virtue of O 15 r 3(1) of the SCR and I so order. Mr Alvin Chong, counsel for the respondent/defendant conceded that this should be the proper order in respect of costs of the application. The learned sessions court judge in his ruling at p 37 of the amended appeal record would seem to agree that the injustice caused to the plaintiff can be compensated for in costs but unfortunately he did not make an order to that effect. The costs of the appeal, however, should go to the respondent/defendant to be taxed, unless agreed.

Appeal dismissed in part.

Reported by Zarinah Marican